

REMARKS

Reconsideration of the present application is requested. In the immediately prior Office Action claim 85 was indicated to contain allowable subject matter pending amendment to correct an issue under Section 112. After Applicant made the requisite amendment, new grounds for rejection of claim 85 and its dependent claims were presented based on a newly cited published application of Mathews.

Mathews was cited as anticipating all of the pending claims. However, Mathews does not include every limitation of independent claim 85. Significantly, the Office Action fails to correlate every limitation of claim 85 to the Mathews disclosure. For example, claim 85 requires that the tube include a seal adapted to engage the annulus fibrosis adjacent the opening in the annulus. This limitation was nowhere identified in the Office Action. The Mathews reference does not disclose a seal on the tube so it cannot anticipate claim 85.

In addition to the significant deficiencies in the Mathews reference relative to Applicant's claims, it is further noted that Applicant completed the claimed invention prior to the earliest filing date of the Mathews publication. The earliest date of that reference is July 20, 2001. Applicant has provided a Declaration under 37 C.F.R. 1.131 of named inventor Larry Boyd. This declaration establishes that Mr. Boyd conceived the claimed invention at least prior to July 20, 2001, and that he acted diligently from that date to the constructive reduction to practice in the form of two provisional applications that were filed on November 1, 2001.

The attached 131 Declaration thus establishes invention by Mr. Boyd of the claimed subject matter before the effective date of the 102(e) reference of Mathews. Mr. Boyd conceived the invention prior to the filing date of the Mathews reference and acted diligently from a date prior to the Mathews filing date, July 20, 2001, until the invention was made the subject of a provisional application filed less than four months later on November 1, 2001.

Conclusion

Although it is believed that the rejection of the pending claims in view of the Mathews publication is improper, Applicant has submitted a Declaration under 37 C.F.R. 1.131 establishing a date of invention prior to the Mathews filing date coupled with diligence until the earliest priority filing date of the present application. Applicant has thus established invention prior to Mathews, thereby removing the Mathews publication as a reference. The pending claims 81, 82, 84-91 and 93-96 are therefore believed to be allowable. Action toward issuance of a Notice of Allowance is earnestly requested.

Respectfully submitted,

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